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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW PATRICK GARCIA,

Defendant and Appellant.

C049205

(Super. Ct. No.
03F10094)

A jury convicted defendant Andrew Patrick Garcia of assault with a firearm with an enhancement for personal use of the firearm, vehicle theft, evading a police officer, felon in possession of a firearm, carrying a loaded firearm in a public place, and resisting a peace officer. In a bifurcated proceeding, the trial court found defendant had suffered a prior strike conviction and had served three prior prison terms. Sentenced to 23 years eight months in state prison, defendant appeals. He contends: (1) one of the pretrial photographic lineups and the victim's in-court identification should have

been excluded, (2) the trial court erred in denying his motion for a new trial based on juror misconduct, and (3) his sentence violated his right to a jury trial as discussed in *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*). Finding no prejudicial error, we affirm.

FACTS

On November 15, 2003, the victim, David Dawson, had three or four beers at a friend's birthday celebration, then left his friend's house on foot, intending to call a cab. According to Dawson, while he was walking, a car pulled up next to him and he was offered a ride home from the car's occupants, a man and a woman whom Dawson referred to as "Toby" and "Sherlese or Sherlene." When they arrived at Dawson's residence, he invited the couple up to his apartment. Toby left the apartment at 2:00 or 3:00 a.m., at which point Dawson went to sleep. In the morning, the woman wrote a note for Toby in case he returned for her and left in a cab. Soon after the woman left, Dawson noticed his ATM card was missing, and he subsequently learned there were fraudulent transactions on the account.

The following day in the late afternoon, Dawson was in his apartment watching football when he heard a knock at his door. He answered the door and saw a man pointing a handgun at him. According to Dawson, the man said, "You know who I am, mother F'er?" Dawson had never seen the man before. The man was Hispanic. He was wearing a stocking hat and a long-sleeved shirt, and he had a tattoo on his neck. The man stepped into the apartment, closed and locked the door, and pointed the gun

at Dawson's face. The man accused Dawson of holding his "sister," "Sherlese or Sherlene or Sharlene," hostage. When Dawson said he did not know what the man was referring to, the man slapped him forcefully, knocking him toward the ground. The man then pointed the gun at Dawson and told him to get down on the ground. Dawson, who thought the man was going to kill him, ran to the window, broke it open and yelled for help. The man then ran out of the apartment.

From his balcony, Dawson saw the man take off his shirt as he walked briskly down the street. Dawson went downstairs to follow the man. Once downstairs, Dawson noticed tattoos on the man's shoulders and back. Dawson had noticed tattoos on the man's neck when he was in Dawson's apartment and still had his shirt on. Dawson yelled at the man and ran after him. He was certain the man he was following was the person who had been in his apartment. When Dawson arrived back at his apartment, he saw the man driving away in a teal blue hatchback. After the car drove away, Dawson called 911.

Within 30 seconds to a minute of receiving the description of the hatchback, Sacramento Police Officer Mathew Moore saw a car matching the description. He ran the license plate and discovered the car was stolen. Officer Moore followed the hatchback and waited for additional officers to arrive. Other officers joined the pursuit with lights and sirens activated, at which point the hatchback accelerated through an intersection against a red light. The hatchback traveled at a high rate of

speed through a residential area, eventually coming to a stop in an alleyway.

Defendant got out of the hatchback and ran. Still inside the hatchback were two females, later identified as Sherish Balderaz and Diana Brownell. The women provided Officer Moore with the address where defendant was going. Officer Moore determined defendant was hiding in a tree house at the address he had been provided. Law enforcement personnel utilized various means to try to get defendant to come down from the tree house. After approximately 17 hours, defendant came down and was taken into custody.

A loaded .22 caliber firearm was discovered during a search of the hatchback. At trial, Dawson testified he was familiar with guns because his father is a "sharp shooter" and he had "been around guns [his] whole life." Dawson testified that his assailant used a chrome plated, small, snub nosed .22 caliber firearm, with two barrels "over and under." When shown the gun found in the hatchback, Dawson said it exactly matched the gun his assailant had used.

At trial, Balderaz acknowledged that her boyfriend at the time of the incident was Tyler Sprague, who went by the name Toby, and that they had since married and had a child. However, Balderaz denied giving Dawson a ride home a couple days before the incident or ever being at his residence. Balderaz also denied leaving a note at Dawson's apartment for Toby and, when shown the note, she continued to claim she had not written it. Balderaz also testified that Toby did not have tattoos.

According to Balderaz, on the day of the incident, defendant picked up Diana Brownell and her at a Starbucks. Balderaz testified that defendant drove to an apartment building and said he had to talk to someone. Defendant got out of the car and went upstairs. Balderaz heard yelling and glass breaking. Defendant returned and told Balderaz to start the car, which she was unable to do because "[t]he only way to start [it] was with a screwdriver." Meanwhile, defendant "sprint[ed]" around the corner. Defendant returned to the car after approximately a minute, at which time he handed Brownell a gun and told her "to do something with it." Defendant started the car, and they drove off.

Sheila Stellini testified that on the day of the incident she was at Jorge Torres's house, as were defendant, Balderaz and Toby. According to Stellini, Toby asked defendant for a ride to confront a man about "putting his hands" on Balderaz in a sexual manner. Stellini testified that defendant borrowed Torres's car, a bluish-green hatchback, and he left with Balderaz and Toby.

A cab driver testified that, on the morning of November 15, he picked up a woman in her twenties on Dawson's block who looked similar in appearance to a photograph he was shown of Balderaz. The woman told him that she and her boyfriend had stayed with a man upstairs, her boyfriend had left in the middle of the night and the man had tried to molest her.

A forensic documents examiner testified that, based on a comparison of a known sample of Balderaz's handwriting with the

note left at Dawson's apartment, it was his opinion that both items were written by the same person.

DISCUSSION

I

Photographic and In-Court Identification

Defendant contends the trial court erred by admitting evidence of the second of two photographic lineups and the victim's in-court identification. Even assuming the second photographic lineup was impermissibly suggestive and that the in-court identification was tainted by the suggestive lineup, we conclude defendant suffered no prejudice.

A. Background

The day after the incident, an officer returned to Dawson's residence with a photographic lineup that included a picture of defendant. Dawson identified two photographs -- a photograph of defendant and one of another man. Dawson was 40 percent sure the man who assaulted him was defendant and 60 percent sure it was the other man whose photograph he picked out.

Several months later, Dawson was shown another photographic lineup, which included a photograph of defendant. Dawson picked out defendant's photograph. Dawson later told a defense investigator that he chose defendant's photograph because he recognized him from the prior lineup.

Before trial, defendant moved to exclude the second photographic lineup and any in-court identification by Dawson. Before ruling on the admissibility of the second lineup, the court stated it would allow Dawson to make an in-court

identification. The court then asked defense counsel if he still wanted the second lineup excluded or if he wanted it admitted in order to cross-examine Dawson about his in-court identification. Defense counsel responded that, based on the court's rulings, he did not want the second lineup excluded.

At trial, Dawson admitted he was able to identify defendant in the second photographic lineup because he recognized him from the first lineup. Dawson testified that defendant looked similar to his assailant, but he was not certain it was the same person due to "the darkness" and the fact that his assailant was wearing a beanie. He explained that, during the incident, his primary focus had been on the gun. Dawson was given the opportunity to view defendant's back and neck in court. He testified that defendant's tattoos were consistent with those he saw on his assailant, but he was not certain they were the same.

B. *Prejudice Analysis*

A suggestive photographic lineup violates a defendant's due process rights when it is "'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" (*People v. Blair* (1979) 25 Cal.3d 640, 659, quoting *Simmons v. United States* (1968) 390 U.S. 377, 384 [19 L.Ed.2d 1247, 1253].) "'The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 412 (*Ochoa*).)

Defendant is entitled to reversal based on the admission of the unduly suggestive identifications unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710]; *People v. Caruso* (1968) 68 Cal.2d at 183, 184.) We conclude that the weakness of the identification evidence rendered the admission of this evidence harmless beyond a reasonable doubt. Therefore, we need not determine whether the evidence was erroneously admitted.

Dawson admitted, at trial, that his identification of defendant in the second photographic lineup was a direct result of seeing defendant's picture in the first lineup. Thus, any value this identification may have had was lost. Furthermore, in court, Dawson was not able to positively identify defendant as the man who attacked him but could only say that defendant "looked like [him]." Both Dawson's identification of defendant in the second lineup and his in-court identification were weak.

In argument to the jury, the prosecutor acknowledged that Dawson had not been able to identify defendant as his assailant with certainty and argued that the jury should convict defendant despite the weak identification. The prosecutor focused on the circumstances surrounding the offense, rather than Dawson's identifications of defendant, to show that defendant was the assailant.

Based on the weakness of the erroneously admitted identification evidence and the fact that the prosecutor, in effect, urged the jury to convict defendant *despite* the

identifications, we conclude that the admission of the evidence in question was harmless beyond a reasonable doubt.

II

New Trial Motion

Defendant asserts the trial court's denial of his new trial motion, based on juror misconduct, was error. Even assuming misconduct, however, defendant was not prejudiced. Accordingly, we reject this assertion.

A. Background

Booking photos of defendant and Toby were introduced into evidence during trial. In the photograph of defendant, he was not wearing a shirt, while in Toby's photograph, he was wearing a T-shirt. Defendant has a darker complexion than Toby, who has red hair. The defense presented an expert on eyewitness memory, who testified regarding several factors that might have contributed to a misidentification of defendant. In closing argument, defendant's trial attorney argued the evidence supported the inference that Toby was Dawson's assailant.

After trial, defendant filed a motion for new trial. Two juror declarations accompanied defendant's new trial motion. The first declaration, from an individual identified as juror number three, included the following statements:

"When the jury first started deliberations, I had some doubts as to whether [defendant] was guilty;

"I needed to fill in some gaps on the case;

"My main doubt was to whether Mr. Toby [*sic*] or [defendant] did the assault;

"On the first day of deliberations, we were trying to find out if tattoos are shown on the mug shots;

"That night, I got on the Sacramento Police Department's website to see if it said whether or not photos of tattoos are included on the mug shots;

"I wasn't able to find anything about it on the website;

"I mentioned to the jury that I tried to find something out about the mug shots but I couldn't;

"I did not mention to the jury that I looked on the Sac PD website, I just said I tried but I couldn't find out whether or not tattoos are shown on mug shots;

"Someone said its [sic] a way for the police to identify people, so photos of tattoos would be included;

"We kind of figured that tattoos would be included on the mug shots." (Paragraph numbering omitted.)

Juror number four also signed a declaration, which defendant filed in support of the motion for new trial. It included the following statements:

"During the trial, the defense attorney brought up that it could have been Mr. Toby [sic] who did the assault;

"One of the jurors, a 30 year old male -- I forget his name, was hung up on this point.

"The testimony was that the man who did the assault took off his shirt when he ran away, showing a lot of tattoos on his body;

"We, the jurors, wanted to know if Mr. Toby [sic] had tattoos;

"There were two days of deliberations;

"On the morning of the second day, the young male juror said he found out that the booking photos showed any and all tattoos;

"This young man said that if the subject had any tattoos, there would be photographs of the tattoos on the booking photos;

"The young man said that if the subject had no tattoos, there would be no additional photographs on booking photos;

"The young man did not say how he knew this;

"We looked at the booking photos of [defendant] and saw the photos of his tattoos;

"We looked at the booking photos of Mr. Toby [*sic*], and there was nothing on the booking photos indicating that he had tattoos;

"I believe this was an important point for that young man, and maybe a couple other jurors who were on the fence;

"Once we concluded that tattoos were included in the booking photos, and that Mr. Toby [*sic*] didn't have tattoos, everybody clearly found [defendant] guilty." (Paragraph numbering omitted.)

The prosecution filed a response to defendant's motion, arguing in part that, under Evidence Code section 1150, subdivision (a), the juror declarations were inadmissible because they contained statements that reflected the jurors' subjective thought processes.

Without addressing the admissibility of the declarations, the trial court ruled that juror number three committed only

attempted misconduct because, according to that juror, he was unable to obtain any outside information. The court found that defendant was not prejudiced by the attempted misconduct "because no information was gained and no information was used during deliberations concerning th[e] attempt to gain that information." The court also found the evidence "overwhelming" that defendant committed the offense. Accordingly, the court denied defendant's motion for a new trial.

B. *Juror Misconduct*

A three-part inquiry is required when ruling on a motion for new trial based on juror misconduct: "'First, [the trial court] must determine whether the affidavits supporting the motion are admissible. [Citation.] If the evidence is admissible, the trial court must determine whether the facts establish misconduct. [Citation.] Lastly, assuming misconduct, the trial court must determine whether the misconduct was prejudicial.'" (*People v. Trujillo Garcia* (2001) 89 Cal.App.4th 1321, 1338.)

1. Admissibility of Juror Declarations

Evidence Code section 1150, subdivision (a), provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent

from the verdict or concerning the mental processes by which it was determined."

Here, the trial court did not rule on the prosecution's objection to the admissibility of the juror declarations under Evidence Code section 1150. However, we must conduct our analysis based only on portions of the declarations concerning the jurors' conduct and any statements that, in their making, constituted misconduct. (See *People v. Lewis* (2001) 26 Cal.4th 334, 388-389.) Therefore, any statement evincing the jurors' mental processes must be disregarded. (*People v. Lewis, supra*, 26 Cal.4th at p. 389.) This includes statements concerning doubts as to whether defendant or Toby committed the assault, the jurors' belief in the importance of the information obtained outside of court, the jurors' belief concerning the importance of the tattoo evidence, what the jurors learned from looking at the booking photographs, whether jurors were "on the fence" concerning defendant's guilt, and what effect the information had on the jurors' votes. "[U]nder both the common law and Evidence Code section 1150, the jurors' motives, beliefs, misunderstandings, intentions, and the like are immaterial." (*People v. Hill* (1992) 3 Cal.App.4th 16, 30, overruled on other grounds in *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5 (*Nesler*).)

The Attorney General argues that the declarations were insufficient to support defendant's motion because they were signed "to the best of my knowledge." The cases relied on by the Attorney General to support this argument focus on the

requirement that declarations be based on personal knowledge, while the phrase "to the best of my knowledge" suggests something short of this. (See *Bowden v. Robinson* (1977) 67 Cal.App.3d 705, 719-720; *Ahrens v. Superior Court* (1988) 197 Cal.App.3d 1134, 1151, fn. 13.) However, the content of the declarations, here, reflect that they were based on each declarant's personal knowledge. In any event, this argument was not raised in the trial court and has been forfeited for purposes of appellate review. (See *Doers v. Golden Gate Bridge Etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1; *People v. Rudd* (1998) 63 Cal.App.4th 620, 628-629.)

2. Juror Misconduct

Juror misconduct occurs when the jury receives evidence from a source other than the courtroom. (Pen. Code, § 1181, subd. 2.) "When a trial court is aware of *possible* juror misconduct, the court 'must "make whatever inquiry is reasonably necessary"' to resolve the matter." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1255, italics in original.)

Here, a juror attempted, at least, to obtain information relevant to the proceedings from a source outside of the court. This conduct constituted misconduct. The jury was instructed not to use evidence from any source other than what was obtained in court. The two juror declarations appear to conflict. Juror number three said that, although he tried to get information from the Sacramento Police Department website, he was unsuccessful and did not tell the rest of the jury that he had obtained information from outside the court that a person's

tattoos are shown in the booking photographs. Juror number four, however, said that a male juror, apparently juror number three, told the other jurors he "found out" that tattoos are shown in booking photographs. It is unnecessary to resolve this minor factual conflict because, even if we assume juror number three obtained information from a source outside of the court and told the other jurors that booking photographs show a person's tattoos, the misconduct was not prejudicial.

3. Prejudice Analysis

Whether prejudice resulted from juror misconduct is subject to our independent review. (*Nesler, supra*, 16 Cal.4th at p. 582, fn. 5.) Therefore, we may consider prejudice even though the trial court did not consider it.

When juror misconduct occurs, reversal is warranted only if there is a substantial likelihood that one or more jurors was influenced by exposure to the material obtained from outside the court. (*In re Carpenter* (1995) 9 Cal.4th 634, 650-651 (*Carpenter*).) Prejudice can be established if, objectively, the extraneous material was "inherently and substantially likely to have influenced the juror." (*Carpenter*, 9 Cal.4th at p. 653.) But it can also be established by examining "the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant." (*Ibid.*) "[I]f it appears substantially likely that a juror is actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict." (*Id.* at p. 654.)

And a conviction must be overturned if even one juror was biased by outside information. (*Id.* at p. 652.)

"[T]he test for determining whether juror misconduct likely resulted in actual bias is 'different from, and indeed less tolerant than,' normal harmless error analysis, for if it appears substantially likely that a juror is actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict.

[Citation.] A biased adjudicator is one of the few 'structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards.' [Citations.] Thus, even if the extraneous information was not so prejudicial, in and of itself, as to cause 'inherent' bias under the first test, the totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose."

(*Carpenter, supra*, 9 Cal.4th at p. 654.)

The entire record, including the trial record, must be examined in making this determination. Factors to consider in making this determination include "the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant." (*Carpenter, supra*, 9 Cal.4th at p. 654.) "[T]he exact nature of the misconduct is highly relevant to the initial determination of bias." (*Id.* at p. 657.)

Dawson testified that the person who assaulted him had tattoos. First, he noticed a tattoo on the assailant's neck while the assailant was in the apartment. And second, he saw tattoo's on the man's shoulders and back when the assailant took off his shirt while fleeing the scene. Whether defendant has tattoos was an important consideration. Because the defense tried to raise doubt in the juror's minds by blaming Toby for the assault, whether Toby has tattoos was also an important consideration. Therefore, the outside information brought into the jury room by juror number three, assuming he did so, concerned an important factual determination -- whether Toby has the tattoos Dawson saw on the assailant.

Despite the relevance of tattoos in this case, it is not substantially likely that the information juror number three brought into the jury room influenced the verdict of any of the jurors. There was no evidence that Toby had tattoos. Balderaz testified that Toby did not have tattoos. Although defendant calls Balderaz's testimony unreliable and it is apparent Balderaz lied with respect to some matters, no evidence contradicted her testimony concerning the tattoos. The booking photograph of Toby that was sent to the jury room showed him in a T-shirt. There was no visible tattoo on his neck, yet Dawson's testimony was that he saw a tattoo on the assailant's neck while the assailant still had his shirt on. Thus, the information that booking photographs show a person's tattoos only provided cumulative evidence that Toby did not have tattoos.

Furthermore, the evidence against defendant was overwhelming, as the trial court noted when it denied the motion for new trial. Defendant has tattoos in the areas of his body as Dawson recalled on his assailant. The assailant was Hispanic, like defendant and not Toby, who has red hair and does not appear to be Hispanic. Defendant was the one who fled the scene in the car, both placing him at the scene and showing his consciousness of guilt.

It is also not substantially likely any juror was actually biased against defendant. As noted, the information that came from outside the court, that booking photographs show a person's tattoos, did not, under the facts of this case, add any information that would influence a juror's individual decision concerning defendant's guilt. Furthermore, the actions of juror number three in attempting to determine whether booking photographs showed tattoos and, as we assume for the purpose of argument, telling the jury that he found out that booking photographs show tattoos do not evince bias on that juror's part. He was apparently trying to determine whether Toby committed the crime, as the defense suggested. (*Contra, Nesler, supra*, 16 Cal.4th at pp. 584-585 [actual bias found where juror negatively influenced in deliberations by information obtained outside courtroom about defendant's drug use].)

Because defendant was not prejudiced by juror number three's misconduct, even if we assume the statements in juror number four's declaration are accurate, there is no need to remand to the trial court for further proceedings.

III

Blakely

Relying on *Blakely, supra*, 542 U.S. 296, defendant claims the trial court erred in imposing an upper term sentence because the court relied on facts not submitted to the jury and not proved beyond a reasonable doubt. Defendant claims he received ineffective assistance of counsel because his trial attorney did not object to his sentence as a violation of *Blakely*. We disagree.

In *Blakely*, the Supreme Court reiterated its holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely, supra*, 542 U.S. at p. 301.) The statutory maximum is the greatest sentence the court can impose based on facts reflected in the jury's verdict or admitted by the defendant. (*Id.* at p. 303.)

After *Blakely*, the California Supreme Court held that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence . . . under California law" does not violate this rule of law. (*People v. Black* (2005) 35 Cal.4th 1238, 1244, 1254, 1262.)

Moreover, the trial court sentenced defendant to the upper term based on his "prior criminal record" and because "for most of his adult life [defendant has been] in custody." Defendant's "prior criminal record" is a permissible sentencing

consideration under *Blakely*. (*Blakely, supra*, 542 U.S. at p. 301.) And, as one valid factor in aggravation is sufficient to expose defendant to the upper term (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433), the trial court's consideration of additional factors did not violate *Blakely*.

We disagree with defendant that the aggravating factor relied on by the trial court went beyond "the mere fact of [his] prior conviction[s]." The trial court noted defendant's numerous prior convictions and relied on his extensive record as the basis for imposing an upper term.

As the sentence was imposed properly, defendant's claim of ineffective assistance of counsel fails.

DISPOSITION

The judgment is affirmed.

_____, NICHOLSON, Acting P.J.

I concur:

_____, RAYE, J.

Concurring and Dissenting Opinion of BUTZ, J.:

I concur in parts I and III of the majority opinion.

However, I respectfully dissent from the majority's conclusion in part II that defendant was not prejudiced by juror misconduct. (Maj. opn., ante, p. 9.)

As noted by the majority, even if the evidence against a defendant is objectively overwhelming, the verdict still must be set aside if the record establishes a substantial likelihood of actual bias (maj. opn., ante, at p. 15). (*In re Carpenter* (1995) 9 Cal.4th 634, 654 (*Carpenter*).) Assuming, as does the majority, that Juror No. 3 was the juror who obtained the out-of-court information in question (maj. opn., ante, p. 15), I believe there is ample basis in the record for finding actual bias.

Factors bearing on a determination of actual bias stemming from juror misconduct include "the nature of the juror's conduct, the circumstances under which the information was obtained[and] the instructions the jury received," in addition to the evidence and issues presented at trial and the strength of the evidence. (*Carpenter, supra*, 9 Cal.4th at p. 654.)

Here, the juror's conduct and the circumstances under which the information was obtained suggest actual bias. The juror actively sought out information to supplement the evidence presented at trial, in direct violation of the trial court's repeated admonition to the jury not to discuss the case with

anyone or independently investigate the facts and, specifically, not to consult any persons or reference materials for additional information. The lack of inadvertence in procuring the information in question underscores the importance of the information, at the very least to the juror who obtained it. Moreover, once the juror obtained the information, he immediately disclosed it to the other jurors. When a juror shares improperly obtained information with other jurors, it tends to establish the importance of that information to the juror making the disclosure. (See *Carpenter, supra*, 9 Cal.4th at p. 657.) And, finally, assuming Juror No. 3 was the juror who made the disclosure, he lied about this in a declaration to the court, again suggesting the significance of the information to this juror.

The information obtained as a result of the juror's misconduct related to a material issue at trial--the determination of who committed the assault. The defense presented evidence that "Toby" had asked defendant to drive him to David Dawson's home and that Toby had a motive for assaulting Dawson. And although Toby was described as a redhead, Dawson's assailant was wearing a beanie that covered his hair and forehead. The out-of-court information obtained by one of the jurors pertained to an identifying feature of Dawson's assailant and tended to refute the defense that Toby committed the assault.

And, although the trial court instructed the jury numerous times to determine the facts only from the evidence received at trial, there is no basis to conclude this instruction had a mitigating effect on the jury's consideration of the out-of-court information it received--the fact that the extraneous information was obtained during deliberations demonstrates a blatant disregard for the court's admonition. Moreover, the juror declarations suggest that, far from disregarding the improper information during deliberations, the jurors reexamined the evidence once the additional information was disclosed and, shortly after, reached a verdict.

The majority confers significance on Sherish Balderaz's testimony that Toby did not have tattoos and the absence of any evidence to contradict her testimony in this regard. (Maj. opn., ante, at p. 17.) But Balderaz's testimony lacked credibility in every respect, particularly on issues that could implicate Toby or her in any misconduct. The fact that the jury sought out information concerning whether tattoos would be shown on booking photos indicates, not surprisingly, that they had doubts about Balderaz's testimony in this regard. The absence of contradicting evidence regarding whether Toby had tattoos does not diminish the inference that can be drawn from the jury misconduct that one or more jurors had doubts whether defendant committed the assault on Dawson.

The majority contends the information was cumulative of other evidence at trial that Toby did not have tattoos, because

Toby was wearing a T-shirt in his booking photo (in which no tattoos were visible), whereas Dawson observed tattoos on his assailant's neck before his shirt was removed. (Maj. opn., ante, at p. 17.) But Dawson's testimony was equivocal in this regard. Dawson was asked whether he observed "any scars or tattoos" on defendant when he first came to Dawson's apartment, and his response was "on the neck." But Dawson explained that he only had "little flashes of visions of what [he] . . . had seen[,] . . . almost [like] in a dream, where it's really not clear." Later, when shown photographs of defendant's neck and shoulders, Dawson testified his assailant's shirt could have come up high enough to cover the tattoos. Dawson explained that his main focus was on "[t]he barrel of that gun the entire time." This testimony was less than compelling on the issue of whether Dawson's assailant had tattoos that would be covered by a T-shirt.

The majority claims the juror's *actions* of seeking the extraneous information and disclosing it to the other jurors does not evince bias because the juror was trying to determine whether someone else committed the offense. (Maj. opn., ante, at p. 18.) But the result of the juror's unauthorized investigation was to bring information before the jury that resolved adversely to defendant the jurors' doubts concerning defendant's guilt. Regardless of the motivation of the juror who sought out the information, the result was actual bias.

The majority reiterates the trial court's finding that the evidence against defendant was overwhelming. (Maj. opn., ante, at p. 18.) I agree with my colleagues that the strength of the evidence on several of the charges--vehicle theft, evading and resisting a police officer, the firearm charges--was so great that defendant could not possibly have suffered actual prejudice from introduction of the extraneous information at issue. However, receipt of the information allowed the jurors to discard the doubts they had about the possibility that Toby committed the assault on Dawson, doubts based on evidence that Toby had a motive for the offense and initiated the visit to Dawson's apartment on the date of the incident. At the very least, the juror who sought out the extraneous information harbored such doubts.

Defendant was entitled to a verdict based *exclusively* on the evidence presented in court. (*People v. Nesler* (1997) 16 Cal.4th 561, 580-581.) "'The requirement that a jury's verdict "must be based upon the evidence developed at the trial" goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. . . . [¶] In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.'" [Citation.] As the United States Supreme

Court has explained: 'Due process means a jury *capable and willing to decide the case solely on the evidence before it*'" (*Id.* at p. 578.) Defendant was denied this fundamental right in the present matter.

I disagree with the majority's conclusion that, regardless of how the juror misconduct occurred, no prejudice was established. (Maj. opn., ante, at pp. 14-15.) In my view, a factual resolution of how the misconduct occurred is necessary for any determination of whether defendant was prejudiced. Yet, despite the implications raised by Juror No. 4's declaration and Juror No. 3's improper conduct, the trial court did not fully address the evidence of misconduct. Because "the exact nature of the misconduct is highly relevant to the initial determination of bias" (*Carpenter, supra*, 9 Cal.4th at p. 657), I would remand the matter for inquiry into the seemingly conflicting juror declarations and a determination of whether there is a substantial likelihood that defendant was biased by juror misconduct. (See *People v. Hayes* (1999) 21 Cal.4th 1211, 1255 [court "'must "make whatever inquiry is reasonably necessary"" to resolve question of possible juror misconduct].)

_____, BUTZ _____, J.